Supreme Court, U.S.
FILED
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MICHAEL RODAK, JR., CLERK

80-400

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

ROMAN G. WENINGER,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR CERTIORARI

TO THE UNITED STATES COURT

OF APPEALS, TENTH CIRCUIT

Harold A. Haddon
HADDON, MORGAN & FOREMAN

Attorneys for Petitioner

350 Equitable Building
730 Seventeenth Street
Denver, Colorado 80202
Telephone: (303) 629-1327

QUESTIONS PRESENTED FOR REVIEW

1) Whether a Defendant in a Federal criminal trial can be compelled to proceed without an attorney in the absence of a free, knowing and intelligent waiver of the right to counsel?

2) Whether the trial of the appellant herein was conducted in violation of his absolute right to the assistance of counsel?

3) Whether a criminal Defendant is denied his right to confront the witnesses against him when the trial judge, recognizing the Defendant's incompetence to represent himself, discharges the witnesses once they are questioned by the Government and never tenders them for cross-examination?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is attached as Appendix A.

JURISDICTION

The decision and judgment of the United States Court of Appeals, Tenth Circuit, sought to be reviewed became final on July 22, 1980, when that Court denied Petitioner's Motion for Rehearing. (Attached as Appendix B)

On August 13, 1980, the Tenth Circuit Court of Appeals stayed its mandate in this matter until September 12, 1980. If notified by that date that this Petition for Writ of Certiorari has been filed, the circuit court's mandate will be stayed until final disposition of those proceedings.

Jurisdiction to review United States Courts of Appeals decisions is conferred on this Court by Title 28, United States

Code, Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . . and to have the assistance of counsel for his defense.

The Fifth Amendment to the United States Constitution provides:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

Roman G. Weninger was convicted by a jury of two counts of Failure to File Federal Income Tax Return, in violation of Title 26, United States Code, Section 7203. He was sentenced to one year confinement upon his convictions. He duly perfected his appeal.

Weninger, a 74 year old man with an eighth grade education, did not have an attorney at his trial. He never appeared before the trial court until the morning of his trial. The trial court never made any inquiry as to whether Weninger wished to waive his right to the assistance of counsel; no hearings were ever held at any time seeking to determine whether Weninger knew of his right to counsel, or intended to proceed in the absence of counsel.

Prior to trial, there was only one communication between Weninger and the trial court. Weninger filed a pro se motion seeking an extension of time to file motions "to seek Assistance of Counsel to prepare . . . Pre-Trial Motions." That request was denied by minute order. On the morning of trial, the sole inquiry made by the trial court was to ask Weninger if he was "ready." When he responded that he was, the jury was sworn and the trial

commenced.

As the trial progressed, the record pathetically demonstrates Weninger's total inability to understand the proceedings, take part in them, or offer the barest semblance of a defense. As witnesses were tendered him for cross-examination, Weninger would repeatedly indicate his ignorance of how to question them in the absence of counsel. He did not cross-examine any witness, he made no objection, he called no witness on his own behalf. He did not know what was meant by instructions; he believed he would be allowed to submit evidence at some later date.

During the course of the trial, the judge recognized the pointlessness of tendering witnesses to the Defendant. From approximately the midpoint in the trial, the judge no longer even nominally tendered prosecution witnesses to Weninger for cross-examination. The pattern developed

that the attorney for the Government would question a witness, and when direct examination was completed, the trial court would excuse the witness. In all, eleven witnesses testified in the trial, whom the Defendant was never given the opportunity to cross-examine, and whom the Petitioner never confronted.

During the course of the trial, the judge not only recognized the inability and lack of legal skill possessed by Weninger, but also noted legal deficiencies in the charges against the Petitioner. For the first time, discourse took place between the court and Weninger about counsel. On several occasions, the court asked if Weninger would obtain counsel and suggested a new trial would be scheduled if he would make efforts to obtain counsel. Unfailingly, the Petitioner replied that he would make such efforts if given the opportunity.

At one point, the trial was recessed so that Weninger could contact counsel. The record is clear that he did so, as an attorney appeared the next morning. The record is not clear, however, as to why those efforts did not satisfy the trial judge. No further statements were made by the court about counsel for the Defendant. Weninger was given no explanation. The trial resumed with Weninger a mere spectator. The Petitioner was convicted at a trial at which he was not represented by counsel at all, despite his repeated requests for assistance.

REASONS FOR GRANTING THE WRIT

We submit that the conduct of the trial in this case was in complete and utter conflict with this Court's numerous decisions holding that there cannot be a waiver of a fundamental constitutional right, such as to the assistance of counsel, absent a showing of the free, knowing

and intelligent waiver of that right.

Even where a misdemeanor offense is charged, there can be no doubt that a person charged with crime has an absolute right to be represented by counsel at his trial. Argensinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963); Powell v. Alabama, 287 U.S. 45 (1932).

Though a waiver of this important and fundamental right is possible, a waiver should not be found unless the record demonstrates that an accused has "knowingly and intelligently" done so. Johnson v. Zerbst, 304 U.S. 458 (1938). The presumption is always against such a waiver, and it is impermissible to presume a waiver from a silent record. Carnley v. Cochran, 369 U.S. 506 (1962); Illinois v. Allen, 397 U.S. 337 (1970).

Though the case of Faretta v. California, 422 U.S. 806 (1975), makes clear

the right of a criminal Defendant to represent himself under certain circumstances, it in no way is in conflict with the other decisions of this Court establishing what is required for a valid waiver. The requirement that a Defendant "unequivocally" and "unmistakeably" assert the right to self-representation before the trial judge is designed to ensure that great care is taken before finding a waiver of such an important right. Even where a waiver is intended, a trial court must make additional inquiries in order to determine that the waiver is both knowing and intelligent. Von Moltke v. Gillies, 332 U.S. 708 (1948).

In Weninger's case, the record cannot be tortured to support the conclusion that there was any waiver whatsoever, let alone a knowing and intelligent waiver. Far from demonstrating a Defendant skilled in the law or highly educated in legal

matters (facts helpful if looking for a waiver), the trial record shows a man totally incapable of representing himself.

More importantly, the record demonstrates that on every occasion when he was asked to respond to the issue of counsel, he indicated a desire to have counsel, not waive it. Prior to trial, the sole communication with the court indicated the desire for counsel's assistance. At various stages of the proceedings, he indicated his helplessness without counsel. When asked by the court if he would make efforts to retain counsel, he invariably indicated he would.

It is impossible to give a full sense of flavor of the trial proceedings without quoting from the record. The following portions of the trial transcript are relevant to the arguments above.

THE COURT: Mr. Weninger, if I give you time, will you hire a lawyer, Mr. Weninger?

MR. WENINGER: Yes (III:15)

. . .

THE COURT: But I just beg of you, get a lawyer. You need one. Will you think about it?

MR. WENINGER: Yes, your honor. (III:37)

. . .

MR. WENINGER: I wouldn't know of any objection, as I say, without counsel. (III:29)

Though space limitations in this Petition do not allow a full exposition of the trial proceedings, it is respectfully submitted that the above-quoted portions of the trial record do not suggest an unmistakable and unequivocal desire to dispense with counsel. The record shows no waiver occurred, no inquiry made, and a trial conducted in derogation of the Petitioner's Sixth Amendment right to the assistantance of counsel.

A review of the record in this case

indicates that the entire trial amounted to a farce and a sham. On several occasions early in the trial, the court would tender witnesses to the Petitioner for cross-examination. Weninger would decline, indicating his inability as a layman to do so. Thereafter, the court ceased to tender the witnesses to Weninger at all, and they were excused without affording him any opportunity whatsoever to confront or cross-examine them.

It is of course well recognized that the primary interest which is secured by the confrontation clause of the Sixth Amendment to the United States Constitution is the right of cross-examination. Douglas v. Alabama, 380 U.S. 415 (1965); Pointer v. Texas, 380 U.S. 400 (1965). Though the witnesses were physically before Weninger when they testified, the requirements of the confrontation clause were not satisfied. As the court began to summarily excuse

them, without tendering them at all, he denied Weninger a most fundamental right. Davis v. Alaska, 415 U.S. 308 (1974); Snyder v. Commonwealth of Massachusetts, 291 U.S. 97 (1934).

Unless it is shown that Weninger waived his absolute right to confront and cross-examine these witnesses, the trial court committed constitutional error of the first magnitude. Brookhart v. Janis, 384 U.S. 1 (1966); Smith v. Illinois, 390 U.S. 129 (1968). For such a waiver to be found, it must be knowingly and intelligently waived. Johnson v. Zerbst, supra.

The record in the trial court is absolutely devoid of any indication that Weninger was given any opportunity to object or accede to the denial of his right of confrontation. The record as a whole shows a farcical proceeding in which the Defendant's complete inability to represent himself was apparent, and in

which the trial judge resolved to finish the trial anyway. Whether this attitude to rush on was caused by a desire not to reset the case for trial, or by an understanding that a mere misdemeanor was involved is not clear. What is clear is that the trial court, in the conduct of this trial, ignored and denied some of the most important and fundamental rights guaranteed a criminal Defendant by the Constitution of the United States.

CONCLUSION

The Petition for Certiorari should be granted, the decision below reversed and the Petitioner granted a new trial.

Dated: September 5, 1980.

Respectfully submitted,

HADDON, MORGAN & FOREMAN

Harold A. Haddon
Attorneys for Petitioner
350 Equitable Building
730 Seventeenth Street
Denver, Colorado 80202
Telephone: (303)629-1327

APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 79-1161
	)	
ROMAN G. WENINGER,	)	
	)	
Defendant-Appellant.	)	

Appeal from the United States
District Court
for the District of Colorado
(D.C. No. 78-CR-220)

Lee D. Foreman of Haddon, Morgan & Foreman, Denver, Colorado for Defendant-Appellant.

William C. Danks, Assistant United States Attorney (Joseph Dolan, United States Attorney, with him on the brief), Denver, Colorado, for Plaintiff-Appellee.

Before BARRETT, PECK* and SEYMOUR, Circuit Judges.

SEYMOUR, Circuit Judge.

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*Of the United States Court of Appeals, Sixth Circuit, sitting by designation.

F I L E D
United States Court of Appeals
Tenth Circuit
JUN 26 1980
HOWARD K. PHILLIPS
Clerk

Weninger was convicted of a misdemeanor for failing to file federal income tax returns for the years 1973 and 1974 in violation of 26 U.S.C. § 7203. At trial, Weninger was permitted to appear pro se to conduct his defense. Weninger appeals to this court through an attorney, contending primarily that (1) his trial was conducted in violation of the Sixth Amendment because he was denied both the right to counsel and the right of confrontation, and (2) the trial court erred in denying his motion for a new trial in light of new evidence uncovered after the verdict. We affirm his conviction.

I.

Sixth Amendment Rights

Weninger is a self-made millionaire. The evidence at trial documented that during 1973 and 1974, Weninger's income exceeded $180,000. Weninger told Dr. Currier, a court appointed psychiatrist who prepared

a presentencing report, that he did not file tax returns as a deliberate protest against the condition of our country. In addition, Dr. Currier's report states that Weninger elected not to have an attorney represent him because "if he asked for help, people might think he was not sincere in his effort." Rec., supp. vol. I, at 8.

The Sixth Amendment provides a defendant with the constitutional right to defend against a criminal charge pro se. Faretta v. California, 422 U.S. 806 (1975). However, the assertion of this right is conditioned on a knowing and intelligent waiver of the constitutional right to the assistance of counsel. Johnson v. Zerbst, 304 U.S. 458 (1938). To ascertain whether Weninger knowingly and intelligently waived his right to counsel, we must consider "the total circumstances of the individual case including background,

experience and the conduct of the accused person." United States v. Warledo, 557 F.2d 721, 727 (10th Cir. 1977) (citing Johnson, 304 U.S. at 464).

It is the duty of the trial judge to initially determine whether an intelligent and competent waiver of counsel has been made by the accused. Von Moltke v. Gillies, 332 U.S. 708 (1948).

> "To discharge this duty properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make

> certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered."

Id. at 723-24. We believe the evidence shows that Judge Winner discharged this duty in the present case.

When Weninger appeared to defend himself at trial, Judge Winner recognized that Weninger's "protest" defense was without merit and asked him, "if I give you time, will you hire a lawyer, Mr. Weninger?" Rec., vol. III, at 15. Weninger answered in the affirmative but stated that he would need "anything from 100 to 120 days" to retain counsel. Id. The judge denied this request as unreasonable and proceeded with the trial.

Shortly thereafter, the judge excused the jury and implored Weninger to hire counsel:

"THE COURT: Mr. Weninger, I plead with you to get a lawyer. I just plead with you to get one. You need a lawyer.[1] You and your wife are facing the strong probability of a term in prison. You should be represented by a lawyer. Obviously, you can afford one.

". . . I have had experience with some of the civil cases you have filed[2] and I know what you think of the legal profession; you don't like lawyers. But you both need a lawyer.

"I will tell you here and now that, in my judgment, there are motions which should have been filed directed to this Information.[3] I will tell you here and now that, in my judgment, you and your wife are not properly charged. I will tell you here and now that, in my judgment, a good lawyer would file motions which would

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[1] Weninger is the sole petitioner on appeal because the charges were dismissed against his wife during the trial.

[2] Weninger had previously sued the Internal Revenue Service eight times, some of which cases were before Judge Winner. In all, he had sued various governmental departments and officials in approximately thirty-five cases.

[3] Subsequently, the United States moved to amend the Information, and Judge Winner permitted the amendment.

require either the filing of a new Information or a substantial amendment to this Information. I will tell you here and now that, in my judgment, this Information is defective. I would not expect anyone untrained in the law to observe the defect. I would think that a competent lawyer would.

* * *

"You need a lawyer. You need a lawyer badly. Both you and your wife may well spend up to two years in prison because you stubbornly refuse to go to a lawyer.

"Now, during this recess, I plead with you that you think about getting a lawyer if not for your own sake at least for the sake of your wife.

"So I am going to take a recess and I am going to ask that during this recess you think about getting a lawyer. In my judgment, a competent lawyer in one hour, and certainly in not less than four, can review this Information and file motions directed to it. . . . I ask you, please think about this. You are into something here that I don't care how much you disapprove of our system of government, I don't care how much you think there's no lawful money except gold coin, I don't care

how much you think federal reserve notes are not legal tender, and I have never understood, since you feel so strongly that they are no good, why don't you just go ahead and pay your taxes with them . . . . But I just beg of you, get a lawyer. You need one.

"Will you think about it?

"MR. WENINGER: Yes, Your Honor."

Rec., vol. III, at 31-33. After the recess, the following colloquy took place:

"THE COURT: All right, Mr. Weninger, what is your decision?

"MR. WENINGER: Well, Your Honor, I feel like I should go along with your suggestion, but I'm not stalling for additional time. The thing I'm asking for a lot of time for is so that I can find the attorney that is concerned about the basic principles of our country.

"THE COURT: No, I am not going to give you that, Mr. Weninger. I know your views, but the members of the Bar, by and large, don't share your views as to our government. If you will go get a lawyer to represent

you in this lawsuit and not to appear and try to make a political crusade out of this, I will go along with it, but I will not go along with it -- I will give you until this afternoon to get somebody. Now, you can get a lawyer to at least come over here and tell me what he is going to do or I will give you until tomorrow morning, but tomorrow morning you are either going to have a lawyer here who will be prepared to go forward in whatever fashion he deems appropriate or we are going ahead this way.

* * *

"I am more than willing, if the lawyer you select wishes, to participate in a matter to be conducted in open court in the presence of everybody this afternoon to explain to him where I think there is a very, very serious defect in this Information, I will do that.

"But I cannot emphasize to you enough that you and your wife are in serious trouble. You are charged with a crime, both of you. Whether a jury will convict you or whether a jury will not convict you remains to be seen. But a man of your

intelligence and a woman of Mrs. Weninger's intelligence should not want to go to trial in a criminal case without a lawyer. It is all right for you to go in a civil case, but a criminal case, if you lose it, I am going to impose sentence on you in exactly the same way I would impose sentence on somebody who was represented by a lawyer. You are not going to get any lighter sentence because of the fact you don't like lawyers, you are not going to get any lighter sentence because of the fact you think the income tax law is -- I don't know what you think it is. It isn't exactly unconstitutional because you say the Sixteenth Amendment was never legally adopted, and the United States Supreme Court and certain other courts have disagreed with you on that despite the fact that they had a border dispute in Ohio when the President and the Secretary of State came from there.

"I say to you, get a lawyer. Now, a lawyer may be able to file motions or not, as he deems appropriate. It may be that a good lawyer may decide that it would be better strategy to continue this trial on this Information and to raise the question post-

> trial. It may be, and I don't know, that if that were done, you might have a double-jeopardy defense that would be fascinating. I don't know and I am expressing no opinion on that. But I am telling you that this Information, as framed, raises some extremely difficult legal problems that neither you nor your wife are adequately equipped to handle. You need a lawyer, you need a good lawyer, and I'm going to ask the jury to come back in and excuse them until tomorrow morning and I am going to explain to them that between now and tomorrow morning you are going to make a decision as to whether you do or do not want a lawyer and I'm going to tell them that I have urged you to get one."

Id. at 34-37 (empahsis added). The judge then apologized to the jury for the delay, explaining that he could not "in good conscience, permit this case to go forward today without the defendants giving further consideration to the wisdom, or lack thereof, of proceeding in this trial without counsel." Id.at 39.

The next day, Weninger stated that he had engaged counsel but the lawyer had not yet appeared. Although the judge allowed the trial to proceed, he implied that a motion for a mistrial might be proper. When the lawyer arrived, the judge again called a recess. For reasons that do not appear in the record, however, this lawyer was not retained and Weninger continued to represent himself.

The record indicates that Weninger had no intention of hiring a lawyer unless the lawyer agreed with his views about the invalidity of the tax laws. However, the right to assistance of counsel does not imply the absolute right to counsel of one's choice. United States v. Dolan, 570 F.2d 1177, 1182-83 (3d Cir. 1978). A defendant's right to obtain counsel of his choice must be balanced against the need for the efficient and effective administration of criminal justice. United

States ex rel. Carey v. Rundle, 409 F.2d 1210, 1214 (3d Cir. 1969). And see Kates v. Nelson, 435 F.2d 1085, 1088-89 (9th Cir. 1970) (quoting United States ex rel. Davis v. McMann, 386 F.2d 611, 618-19 (2d Cir. 1967)0, where the court said:

> "'[W]e have recognized a right of a defendant to proceed without counsel and to refuse the representation of . . . counsel. * * * [H]e may not use this right to play a 'cat and mouse' game with the court * * * or by ruse or strategem fradulently seek to have the trial judge placed in a position where, in moving along the business of the court, the judge appears to be arbitrarily depriving the defendant of counsel.'"

Weninger first indicated on July 3, 1978, in an application for additional time to file motions, that he intended to retain counsel. He had ample time to do so before the start of his trial on September 11, 1978. During trial, the judge repeatedly tried to persuade

Weninger to secure representation. The judge even offered to explain to the lawyer the defects he perceived in the Information. Nevertheless, a lawyer was not retained. The record and surrounding circumstances sufficiently demonstrate that Weninger had a reasonable opportunity to retain counsel. See United States v. Gates, 557 F.2d 1087 (5th Cir. 1977).

The record as a whole indicates that, although Weninger was made "aware of the dangers and disadvantages of self-representation," Faretta, 422 U.S. at 835, he strategically chose to appear pro se. However, after the jury refused to uphold his patriotic protest against the federal income tax, Weninger retained counsel to contend on appeal that the conduct of his trial was constitutionally impermissible. We refuse to permit this type of game to be played with the courts. We hold that

Weninger's stubborn failure to hire an attorney constituted a knowing and intelligent waiver of the right to assistance of counsel.

Weninger also contends that his inability to cross-examine witnesses or object to exhibits violated his Sixth Amendment right of confrontation. We point out that the trial court, sympathetic to the disadvantges of self-representation, assisted the defendant at times during the trial by objecting to government questions and exhibits. In any event, the Court noted in Faretta that a defendant who exercises his right to represent himself cannot be heard to complain on appeal that his own representation was ineffective. 422 U.S. at 835 n. 46; and see United States v. Rowe, 565 F.2d 635 (10th Cir. 1977). Since we hold that Weninger was properly permitted to appear pro se, his lack of legal expertise cannot be the basis for a reversal.

II.

Motion for New Trial

Finally, Weninger argues that new evidence was uncovered after the verdict which required the granting of his motion for a new trial because it established that he did not have the requisite criminal intent to violate 26 U.S.C. §7203. The standard for granting such a motion based on new evidence is extremely stringent. One criterion is that the evidence "is material and of such a character that on a new trial such evidence would probably produce a different result." United States v. Maestas, 523 F.2d 316, 320 (10th Cir. 1975).

The source of the new evidence here was Dr. Currier who stated in his present-ence report that, in his opinion as a psychiatrist, "there was no criminal intent" when Weninger failed to file his

income tax return. Rec., supp. vol. I, at 11. His judgment appears to have been based on the fact that Weninger was motivated by a good faith belief that nonpayment of his taxes would somehow alert the country about problems in the United States' economy.

However, the "willfulness" requirement of 26 U.S.C. §7203 has been defined as "a voluntary, intentional violation of a known legal duty." United States v. Bishop, 412 U.S. 346, 360 (1973). Thus, no matter how earnestly a defendant disagrees with the income tax or believes it unconstitutional, he will be guilty of violating section 7203 if he deliberately fails to file. United States v. Ware, 608 F.2d 400 (10th Cir. 1979). Good motive is irrelevant if the defendant knows of his duty to file. United States v. Pomponio, 429 U.S. 10 (1976).

In this case, an agent of the

Internal Revenue Service testified that Weninger had filed income tax returns for the years 1969-1972. Weninger conceded that he failed to file for the years 1973 and 1974 as a protest. He told Dr. Currier that "he did not file his tax returns deliberately in order to make an issue that he hoped would stir people to some positive action." Rec, supp. vol. I, at 7. When Dr. Currier asked him if he believed he had broken the law, "[h]e answered in the affirmative but said he felt there was no criminal intent because he was doing it for the positive purpose of raising an alarm about the danger in which the United States economy found itself." Id. at 8. The record amply demonstrates that Weninger disregarded a duty known to him and, therefore, acted with "willfulness" as required by section 7203. Since the opinion of Dr. Currier as to Weninger's lack of criminal intent would

not affect the verdict, the motion for a new trial was properly denied.

We find Weninger's remaining contentions without merit.

AFFIRMED.

APPENDIX B

JULY TERM - July 22, 1980

Before Honorable James E. Barrett,
Honorable Stephanie K. Seymour and
Honorable John W. Peck*, Circuit Judges

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
vs.	)	No. 79-1161
	)	
ROMAN G. WENINGER,	)	
	)	
Defendant-Appellant.	)	

This matter comes on for consideration of the petition for rehearing filed by the appellant in the captioned case.

Upon consideration whereof, the petition for rehearing is denied.

HOWARD K. PHILLIPS
Clerk

By:
Robert L. Hoecker
Chief Deputy Clerk

*Of the United States Court of Appeals for the Sixth Circuit, sitting by designation.